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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 86

REGAL KNITWEAR CO., INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR REGAL KNITWEAR CO., INC., PETITIONER

The Opinion Below

The opinion of the Court below, dated February 15, 1944 (R. 287), is reported in 140 Fed. (2d) 746.

Jurisdiction

The decree under review is one of enforcement of an order of the National Labor Relations Board made in a proceeding pursuant to Section 10(c) of the National Labor Relations Act.

Certiorari was granted by this Court on October 9, 1944 (R. 292), limited to the sixth question presented by the petition for the writ.

The jurisdiction of this Court is invoked under Section 10(e) of said Act, and Section 240 of the Judicial Code.

The Question Presented

The single question now before this Court is whether the Board's order and the Circuit Court's decree of enforcement were properly directed against petitioner's successors and assigns.

Statute Involved

The only statute believed to be involved is Section 10(c) of the National Labor Relations Act (hereinafter referred to as the Act), the pertinent provisions of which are set forth in the Appendix.

Statement of the Case

The decree below (R. 290) directed that Regal Knitwear Co., Inc., "its officers, agents, successors and assigns", shall: (1) cease and desist from discouraging Union membership by discharging or refusing to reinstate employees, or by discriminating in regard to hire, tenure, or any term or condition of employment, and from in any other manner interfering with its employees in the exercise of the rights granted in Section 7 of the Act; (2) offer one Jean Strackman reinstatement and back pay; (3) post certain notices; (4) notify the Regional Director of the Board of the steps taken to comply with the decree.

Argument

There is no evidence in the record before the Board or before the Circuit Court which even remotely tends to indicate that petitioner has or ever had any intention of liqui-

dating or reorganizing its business, or transferring its assets to any other person, firm or corporation, for any purpose whatsoever, and no such claim has ever been made in this case.

The considerations appearing in *Southport Petroleum Company* v. *National Labor Relations Board*, 315 U. S. 100; *National Labor Relations Board* v. *Hopwood Retinning Co.*, 104 Fed. (2d) 302; *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671, and similar cases, wherein there was a record of accomplished or contemplated change in the corporate form or entity under circumstances indicating a studied attempt to avoid compliance with the Court's decree, are therefore entirely lacking in this case.

The Circuit Courts in the Sixth and Seventh Circuits, both of which hold that the words "successors and assigns" have no proper place in an order of the Board or in an enforcement decree, at least in cases in which such special circumstances are not shown to appear,[1] and the Circuit Court of Appeals in the Second Circuit,[2] appear to agree that the inclusion of the words "successors and assigns" in the Board's order and in the enforcement decree do not impose any liability upon such successors and assigns which would not have existed had the words not been included.

Thus, in the *Bachelder* case,[3] the Circuit Court of Appeals for the Second Circuit, in an enforcement proceeding wherein the employer was a receiver, in modifying its decree by striking out the words "successors and assigns,

[1] *National Labor Relations Board* v. *Cleveland-Cliffs Iron Co.*, 133 Fed. (2d) 295 (6th Circuit; *National Labor Relations Board* v. *Bachelder, Receiver of Hoosier Veneer Co.*, 125 Fed. (2d) 387 (7th Circuit).

[2] *National Labor Relations Board* v. *Blackstone Manufacturing Co., Inc.*, 123 Fed. (2d) 633, 635 (2nd Circuit) followed by the court below in the instant case.

[3] Note 1 supra.

including Hoosier Veneer Co. in the event the receivership is discharged," said:

> "The reason assigned for striking the words 'successors and assigns including Hoosier Veneer Co. in the event the receivership is discharged,' is that the decree as now entered operates as an injunction against one not subject to any enforcement decree. A mere change in name or in apparent control where in fact there was no such change, would be no reason for striking from the decree the words 'including Hoosier Veneer Co. in the event the receivership is discharged,' in the event there would be no good faith successor or assign of the original company, and the latter would still be amenable to the decree. Whether there is a good faith successor or assign in this case we do not here decide. Under Southport Petroleum Co. vs. NLRB, 62 S. Ct. 452, decided January 16, 1942, the place to try that question of fact is either before the Board or before this court if and when a petition is filed here to show cause why the decree is not complied with.
>
> However, the words 'successors or assigns' in the decree connote good faith successors and assigns, and for that reason they should be and are hereby stricken."
>
> (125 Fed. (2d) 387, at 388)

Similarly, the Court in the Sixth Circuit in the *Cleveland-Cliffs Iron Co.* case,[4] in eliminating the words "successors and assigns" from its order, said:

> "We have no doubt that a merely colorable transfer which is not a true change of ownership would, without the provision, properly raise a question of fact to be resolved by the Court if contempt proceedings are instituted. *Southport Petroleum Company* vs. *NLRB*, 315 U. S. 100. This was, no doubt, impliedly the view in the Seventh Circuit in cases decided after the *Southport* decision. *NLRB* vs. *Bachelder*, 125 Fed. (2d) 387;

[4] Note 1 supra.

NLRB vs. *Stone*, 125 Fed. (2d) 752. The provision should be eliminated from the order."

(133 Fed. (2d) 295, at p. 302.)

The Second Circuit, while differing with the Sixth and Seventh Circuits by holding that the words "successors and assigns" are properly includable in the order and decree, and declining to eliminate them, nevertheless agrees with those Circuits to the extent of expressly taking the position that the words do not impose any liability which would not exist without them. We quote from that Court's opinion in the *Blackstone* case:[5]

> "In allowing these words (successors and assigns) to stand we wish to make it clear, however, that we do not hold that a 'successor' or an 'assign' will be in contempt of our order if it should (even after notice of the order, but without participating with the respondent in any disobedience by it) do exactly those things which the order forbids. In other words, we do not hold that those words impose any liability which would not exist without them."
>
> (123 Fed. (2d) 633, at p. 635)

We submit that, upon principles firmly established in equity cases in this[6] and other courts, the words "successors and assigns," although adding nothing to the decree, should not have been included in the decree by the Court below, and, having been included, should be stricken therefrom by this Court.

In the *Chase National Bank* case,[7] one of the questions before this Court was the propriety of a decree of permanent injunction whereby the decree was made to run, in form, not only against the City of Norwalk, which was the

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[5] Note 1 supra.

[6] *Chase National Bank* v. *City of Norwalk*, 291 U. S. 43; *Scott* v. *Donald*, 165 U. S. 107; *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U. S. 229.

[7] Note 6 supra.

party to the suit, and against its officers, agents and employees, but also against "all persons whomsoever to whom notice of this order shall come." This Court held at pages 436-437:

> "* * * The decree entered by the district court was clearly erroneous insofar as it enjoined 'all persons to whom notice of the order of the injunction should come from taking any steps or action in the state court.' The city alone was named as defendant. No person other than the city was served with process. None came otherwise before the court. The prayer of the bill sought relief solely against the city and 'its officers, officials, agents, employees and representatives.' It is true that persons not technically agents or employees may be subsequently enjoined from knowingly aiding a defendant in performing a probibited act if their relation is that of associate or confederate. Since such persons are legally identical with the defendant and privy to his contempt, the provision merely makes explicit as to them which the law already implies. See *In re Lennon*, 166 U. S. 548. But by extending the injunction to all persons to whom notice of the injunction should come, the district court assumed to make punishable as a contempt the conduct of persons who act independently and whose rights have not been adjudged according to law. See *Alemite Mfg. Corp.* vs. *Staff*, 42 Fed, (2d), 832. Under the clause inserted in the decree officers of the State of Ohio might be proceeded against for contempt, if they should apply to the State court to enforce its judgment, although acting solely in the performance of their official duty. To subject them to such peril violates established principles of equiy jurisdiction and procedures. *Scott* vs. *Donald*, 165 U. S. 107, 117; *Hitchman Coal & Coke Co.* vs. *Mitchell*, 245 U. S. 229, 234. Those principles require that the clause be limited to confederates or associates of the defendant."

Similarly, in the *Scott* case,[8] this Court held:

> "The decree is also objectionable because it enjoins persons not parties to the suit. This is not a case where the defendants named represent those not named. Nor is there alleged any conspiracy between the parties defendant and other unknown parties. The acts complained of are tortious, and do not grow out of any common action or agreement between the constables and the sheriffs of the State of South Carolina. We have, indeed, a right to presume that such officers, although not named in this suit, will, when advised that certain provisions of the act in question have been pronounced unconstitutional by the court to which the Constitution of the United States refers such questions, voluntarily refrain from enforcing such provisions; and we do not think it comports with well settled principles of equity procedure to include them in an injunction in a suit in which they were not heard or represented or to subject them to penalties for contempt in disregarding such an injunction.
>
> The decree of the court below should therefore be modified by being restricted to the parties named as plaintiff and defendant in the bill, and this is directed to be done, and it is otherwise, affirmed."

Petitioner has the right to raise this question now, for its rights are prejudiced by the inclusion of these words in the decree below, and it would be too late for petitioner to raise the objection at some future time in the event of contempt proceedings against its successors or assigns, for petitioner would not then be directly affected by those proceedings. Petitioner's rights are prejudiced because, as pointed out by the Court in the *Cleveland-Cliffs Iron Co.* case,[9] the inclusion of the provision in the decree below would make it difficult, and perhaps a practical impos-

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[8] Note 6 supra.

[9] Note 1 supra.

sibility, for petitioner to sell or otherwise transfer its business or a portion thereof to an independent bona fide purchaser, should legitimate occasion therefor arise. Petitioner might not then be able to convince the proposed purchaser, by citation of legal authority or otherwise, that the decree, which purports to bind such purchaser does not in fact bind it, and in any event petitioner should not be placed under the necessity of attempting that task. It might even be that such a purchaser could seek, successfully or otherwise, to avoid its contract of purchase by reasoning analogous to that of the cases in the law of real property sales which permit contract vendees to reject titles legally sound but subject to litigation to defend their sufficiency. It may well be that the words "successors and assigns" in the decree do not have the effect of imposing a servitude upon petitioner's assets and business in the hands of such successors and assigns; nevertheless, petitioner's title, while legally free from such a servitude, might still be condemned as unmarketable or, as some cases put it, unmerchantable.

There is no warrant in Section 10(c) of the Act for any order or decree against any person other than the person named in the complaint. Section 10(c) provides that if upon all the testimony taken the Board shall be of the opinion that "any person named in the complaint" has engaged in or is engaging in unfair labor practices interdicted by the Act, then the Board shall state its findings of fact and shall issue and cause to be served "on such person" an order "requiring such person" to cease and desist, and "requiring such person" to take such affirmative action as will effectuate the policies of the Act. Nowhere is any authority conferred upon the Board or upon the Court to "require" any other person to cease and desist, or to take any affirmative action. Nevertheless, that is what the Board's order herein, and the decree of enforce-

ment herein, purport to do by the inclusion of the words "successors and assigns" in such order and in such decree.

The elimination of the words "successors and assigns" from the decree herein would not prevent the enforcement of the decree against petitioner's successors or assigns upon a showing of appropriate circumstances, such as were found to exist in the *Southport Petroleum* case, the *Hopwood Retinning Co.* case, or the *James V. Reuter* case.

Thus, in the *James V. Reuter, Inc.* case, where in the words "successors and assigns" did not appear in the decree, this Court stated that the decree might "in appropriate circumstances, be enforced against those to whom the business may have been transferred, whether as a means of evading the judgment or for other reasons", and that the question as to how far a successor is bound by the decree might be fully investigated by the district court in subsequent contempt proceedings. Such cases not only are no authority for the inclusion of the words "successors and assigns" in the decree; they clearly indicate that the inclusion of such words is not necessary either to the proper enforcement of the Board's order or to effectuate the policies of the Act.[10]

Conclusion

The words "successors and assigns" should be stricken from the enforcement decree.

Respectfully submitted,

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[10] National Labor Relations Act, Section 10(c).

APPENDIX

National Labor Relations Act

Sec. 10 * * *

(c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *